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Introducing Personal Liability Into Corporate Negligence: An Analysis of the *Trek Leather* Decision

Are you an owner or officer of a small or midsize business? An import or trade compliance professional? Someone whose job responsibilities include some aspect of the process of importing merchandise into the United States, whether or not that includes the "formal entry" of merchandise? As of September 16, 2014, the possibility of finding yourself personally exposed to potentially massive civil penalties for your company's import activities has skyrocketed.

The US Court of Appeals for the Federal Circuit issued its *en banc* opinion on September 16 in the closely watched case of *United States v. Trek Leather, Inc*. This case stems from a civil penalty issued by US Customs and Border Protection (CBP) to an importing company, Trek Leather, and its president, Harish Shadadpuri, for Trek Leather's failure to declare the value of assists to imported suits. The government sought to impose civil penalties against both the company and Mr. Shadadpuri under the customs civil penalty statute, 19 USC § 1592.

Under 19 USC § 1592(a)(1)(A), no person, by fraud, gross negligence or negligence, "may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States" by means of a false material statement or false omission. Before September 16, the question presented by this case was believed to be whether a penalty could be issued against a corporate officer, director or shareholder for the negligent or grossly negligent violations of his or her company. The effect of this decision, however, strikes a much different (and, if you are involved in your company's import activities, much more treacherous) tone.

The Federal Circuit's original opinion held that while Mr. Shadadpuri was a "person" who could be subject to the penalty provisions of Section 1592(a), only *importers of record* and certain other identified entities had the responsibility of making entry, and penalties under Section 1592 for failure to meet that responsibility could only be assessed against parties who owed that duty. For the government to assess a penalty against an individual for violations stemming from entries filed by that individual's importer-of-record company, one of three situations had to arise: the government had to (1) "pierce the corporate veil" to establish that the individual was in fact the importer of record; (2) establish that the individual him or herself was liable for fraud; or (3) establish that the individual was an aider and abettor of the company's fraud.

Upon rehearing, the Federal Circuit ignored its prior discussion about who is responsible for "entering" merchandise into the United States and instead turned its focus to the meaning of the term "introduce" in the civil penalty statute. The question that the court addressed was whether any of Mr. Shadadpuri's actions constituted "introducing" merchandise into US commerce.

For more information, or if you have any questions, please contact your Katten Muchin Rosenman LLP attorney or any of the following members of Katten's **Customs and International Trade** team.

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The court first analyzed the breadth of the term "introduce" by referencing a 100-year-old US Supreme Court case dealing with the forfeiture laws at the time, *United States v. 25 Packages of Panama Hats*. In that case, the merchandise at issue was shipped to the United States by means of invoices that falsely valued the goods. However, no party attempted to enter the goods into the United States and the shipment was placed into a customs bonded warehouse. Although the goods had not "entered" the United States, the Supreme Court held that they had been "introduced" by being consigned to a person in the United States, shipped to a US port, unloaded from the vessel and placed in a customs warehouse. Based on this decision, the Federal Circuit held that the term "introduce" in 19 USC § 1592 is broad enough to include acts that extend beyond the formal filing of an entry, including actions relating to a shipment where no entry is filed.

The Federal Circuit in this opinion chose not to define exactly what activities constituted "introductions" within the meaning of the statute. Suffice to say that actions that "bring goods to the threshold" of the entry process—such as moving goods to CBP custody, or providing documents for use in filing of papers for a contemplated release—fall within that definition. The Federal Circuit did conclude that Mr. Shadadpuri's actions—which involved importing the suits "through one or more of his companies" and causing shipments of the imported suits to be transferred from one company to another by directing the customs broker to make the transfer—also fell within that definition.

One thing this ruling did not do is establish liability for corporate officers, directors or shareholders based solely on their status within the company. The Federal Circuit specifically did not hold Mr. Shadadpuri liable "because of his prominent officer or owner status" with Trek Leather. The Federal Circuit also avoided the issue of whether the government must pierce the corporate veil to attach liability corporate officers or directors. Instead, it held Mr. Shadadpuri liable "because he personally committed a violation of [Section 1592(a)(1)(A)]."

The possible takeaways from this ruling are sobering for anyone who is employed in an import operations or compliance capacity. By holding that Mr. Shadadpuri had *personally* violated Section 1592 through his activities that supposedly "introduced" the merchandise into the United States, while leaving the term "introduce" itself open to interpretation, the Federal Circuit may be opening exposure to personal liability to all sorts of individuals who are simply trying to do their jobs. Many compliance officers may find that their ordinary routines are filled with activities that may be construed as "introducing" merchandise into the United States. Should any of their activities end up being incorrect, they could find themselves facing personal liability.

What makes this even more troubling is the way in which civil violations under Section 1592 are proven. If the government shows that a violation occurred, and alleges that it was made negligently, the burden falls on the accused to prove that he or she acted with "reasonable care." In other words, if you are employed as an import or compliance operations officer, and you happen to make a mistake that leads to a violation of Section 1592, you are presumed to have acted negligently unless you can prove otherwise. And, based on this opinion, you may become personally liable for the civil penalties that could be assessed as a result.

While the fallout from this case in practice may not be so dire, the idea of having faith in the government's common-sense application of "prosecutorial discretion" in civil penalty cases may be cold comfort. At the least, this ruling leaves open many questions that will have to be answered either by the Supreme Court or during the course of years of subsequent litigation that is sure to ensue. Certainly, those whose job responsibilities involve handling any aspect of their company's import operations may do well to get ahead of the situation and seek protection from their employer as to the potential fallout from this case.